UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALFREDO RUDY PENA,

Petitioner,

v.

CONNIE GIPSON,

Respondent.

Case No. 12-cv-01111-WHO (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Petitioner Alfredo Rudy Pena seeks federal habeas relief from his state convictions because (1) the trial court's exclusion of third party culpability evidence deprived him of his right to due process; and (2) the CALCRIM No. 376 instruction lessened the prosecutor's burden of proof.[1] Because neither of these claims has merit, the petition for habeas relief is DENIED.

BACKGROUND

In 2009, a Santa Clara County Superior Court jury found Pena guilty of first degree murder and first degree robbery. (Ans., Ex. 6 at 1 (State Appellate Opinion, *People v. Pena*, No. H034159, 2010 WL 4112211 (Cal. Ct. App. Oct. 20, 2010) (unpublished).) He

[1] Pena's two other claims were dismissed upon a motion by respondent. (Docket No. 20.)

received a sentence of 75 years to life in state prison. (*Id.*) His attempts to overturn his convictions in state court were unsuccessful. This federal habeas petition followed.

The prosecution proved to the jury's unanimous satisfaction that on May 6, 2007, Pena tied up and strangled to death Johanna Giron, a prostitute, in her hotel room, and then used her credit card for purchases. The evidence included test results showing that his DNA signature matched that of DNA samples taken from Giron's hand and from the cloth used to tie her up at the crime scene, the record of many calls that were made from his cell phone to the victim's during the time surrounding her death, and the testimony of a store clerk that Pena looked similar to a person who attempted to use Giron's credit card a few days after her death. (*Id.* at 4-8.) Pena also told the police that he had visited Giron the night of her death, stated that he left after she had refused his offer of money in exchange for her sexual services, and admitted that he stole her laptop computer. (*Id.* at 10.)

STANDARD OF REVIEW

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13 (2000).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

When presented with a state court decision that is unaccompanied by a rationale for its conclusions, a federal court must conduct an independent review of the record to determine whether the state-court decision is objectively unreasonable. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). This review is not de novo. "[W]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011).

DISCUSSION

I. Exclusion of Evidence of Third Party Culpability

Prior to trial, Pena sought to admit evidence that another person, Turo Collins, was Giron's killer.[2] He made an offer of proof that Collins (1) telephoned Giron on May 6th, (2) was within 3 miles of Giron's hotel near the time of her murder, (3) had sufficient time to commit the crime, (4) lacked a good alibi because his girlfriend repeatedly lied about his whereabouts on May 6th, and (5) was arrested in 2006 for beating up a woman and, while holding a gun to her head, threatening to shoot her. (Ans., Ex. 6 at 12.)

[2] At trial, Pena also sought to introduce evidence that another man, Vincent Hudson, could have been responsible, but his motion was denied. He did not raise the exclusion of the Hudson evidence to the state appellate court, which deemed the claim waived, nor has he raised the claim in this action. (Ans., Ex. 6 at 12 n.10.)

The prosecution responded that (1) the only connection between Collins and Giron was the telephone call, and that there was no evidence that he had actually talked to her, (2) no physical evidence linked Collins to the crime, and (3) neither Collins nor his blue Cadillac was seen on any of the hotel's video footage that was taken around the time of the murder. (*Id.* at 13.)

The trial court excluded the evidence. It concluded that there was no direct or circumstantial link between Collins and the murder. It found that whatever probative value the evidence had was outweighed by concerns about consuming undue court time and a creating a confusion of issues. (*Id.*)

The state appellate court rejected Pena's claim. Evidence of third-party culpability must be "direct or circumstantial evidence linking that third person to the actual perpetration of the crime." (*Id.* at 15.) Evidence of mere motive or opportunity to commit the crime is insufficient to justify the admission of third-party culpability. (*Id.* at 18.) Under these principles, it held that the trial court acted well within its discretion in excluding the evidence. Further, the court found that "it was questionable whether Collins ever spoke with [Giron] at all" and that there was no evidence that Collins met Giron or went to her hotel. (*Id.*) Pena, on the other hand, admitted to being in Giron's hotel room close in time to her murder.

State and federal rulemakers have broad discretion in excluding evidence from trials, limited by a defendant's constitutional rights to due process and to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). The Court recognizes that "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Id.* at 326. The Ninth Circuit has repeatedly found that state courts have acted reasonably in excluding unreliable or insubstantial evidence of third-party culpability. *See Phillips v. Herndon*, 730 F.3d 773, 776-78 (9th Cir. 2013); *Christian v. Frank*, 595 F.3d 1076, 1085-86 (9th Cir. 2010); and *Spivey v. Rocha*, 194 F.3d 971, 978 (9th Cir. 1999).

Habeas relief is not warranted here. The state appellate court reasonably determined that the evidence lacked probative value. There was no evidence, either direct or circumstantial, that linked Collins to the murder. The sole link between him and the victim was evidence that he called her, a link made weaker by the fact that there is no evidence that they ever spoke. The state appellate and trial courts reasonably determined that introduction of such insubstantial evidence would unduly consume court time.

Furthermore, Pena has not shown prejudice. There was strong evidence supporting his guilt. He admitted to being at the crime scene. His DNA signature matched those of the samples taken from the crime scene of the victim's hand and of the cloth bindings that were used to tie her up. There was a record of many phone calls from him to Giron. And there was testimony from a store clerk that Pena resembled the man who tried to use Giron's credit card after the murder.

The state appellate court's decision was reasonable and is entitled to AEDPA deference. This claim is DENIED.

II. CALCRIM No. 376

Pena's next claim regards the words italicized below in the text of CALCRIM No. 376 ("Possession of Recently Stolen Property as Evidence of a Crime"), which, as read to his jury, states

> If you conclude that the defendant knew he possessed property and you conclude the property had in fact been recently stolen, you may not convict the defendant of robbery or the lesser offense of theft based on those facts alone; however, if you also find supporting evidence tends to prove his guilt, then you may conclude the evidence is sufficient to prove robbery or the lesser offense of theft. *The supporting evidence need only be slight, [and] need not be enough by itself to prove guilt.* You may consider how and where the defendant possessed the property along with any other relevant circumstance tending to prove his guilt of the robbery or the lesser offense of theft. [¶] Remember, you may not convict the defendant of any crime unless you're convinced each fact essential to conclude the defendant is guilty of a crime has been proved beyond a reasonable doubt. (Italics added.)

(Ans., Ex. 6 at 22.) Pena contended on appeal that the term "slight" as used in the

instruction unconstitutionally lowered the prosecutor's burden of proof:

> 'To tell jurors that they may make an inference of guilt based on 'slight' corroboration is to dilute the constitutionally ineluctable rule that a criminal conviction may be predicated only on proof beyond a reasonable doubt.' [Pena] contends that the instruction was not prejudicial 'to the robbery conviction as such,' but rather reduced the prosecution's proof burden for murder.

(*Id.*)

The state appellate court rejected this claim. "[T]here is nothing in the instruction that directly or indirectly addresses the burden of proof, and nothing in it relieves the prosecution of its burden to establish guilty beyond a reasonable doubt." (*Id.* at 23) (citations omitted). Also, the court's other instructions on the weighing of evidence and burdens of proof eliminated the possibility that the instruction reduced the burden of proof. (*Id.*)

The court also found that the instruction's use of "slight" does not violate due process. The state appellate court concluded that the instruction allows the jury to draw a permissive inference. Because it is a permissive, rather than a mandatory, inference, due process requires only that the supporting evidence be slight. (*Id.*)

The Due Process Clause requires the prosecution to prove every element charged in a criminal offense beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). If the jury is not properly instructed that a defendant is presumed innocent until proven guilty beyond a reasonable doubt, the defendant has been deprived of due process. *See Middleton v. McNeil*, 541 U.S. 433, 436 (2004). Any jury instruction that "reduce[s] the level of proof necessary for the Government to carry its burden . . . is plainly inconsistent with the constitutionally rooted presumption of innocence." *Cool v. United States*, 409 U.S. 100, 104 (1972).

To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the disputed instruction by itself so infected the entire trial that the resulting

conviction violates due process. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. *Id.* In other words, a federal habeas court must evaluate the jury instructions in the context of the overall charge to the jury as a component of the entire trial process. *United States v. Frady*, 456 U.S. 152, 169 (1982) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)).

Habeas relief is not warranted here, both because the instruction was proper and there was no prejudice to Pena. First, the state appellate court reasonably concluded that the instruction did not lower the prosecution's burden of proof. The instruction repeated the reasonable doubt standard at its end, reminding the jury that its final determination of guilt must adhere to that standard. That supporting evidence need only be "slight" lowered no burden of proof. The instruction clearly limited the use of "slight" to only one sub-part of a larger determination, a larger determination that was subject to the beyond a reasonable doubt standard. Furthermore, the jury could not consider that "slight" supporting evidence until it had first concluded that Pena knowingly possessed stolen property and that the property had in fact been recently stolen.

In addition, the jury heard a separate instruction that it cannot convict petitioner of any crime unless the prosecutor proves his guilt beyond a reasonable doubt. (Ans., Ex. 2, Vol. 6 at 672-73.) Jurors are presumed to follow their instructions. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987). This Court must presume that the jury understood the trial court's instructions and applied the correct standard. *Id.*

Second, Pena has not shown prejudice. The evidence of his guilt was strong. He admitted to meeting Giron on the day of her death, his DNA signature was found at the crime scene, he called her many times in the time surrounding her death, and he was seen using her credit card in the days following her death. The weight of this evidence renders meritless any contention that he suffered prejudice.

There is no support for the assertion that the disputed instruction lowered the burden of proof or deprived Pena of a constitutionally fair trial. The state appellate court's

decision was reasonable and is entitled to AEDPA deference. This claim is DENIED.

CONCLUSION

The state courts' adjudication of Pena's claims did not result in decisions that were contrary to, or involved an unreasonable application of, clearly established federal law, nor did they result in decisions that were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, the petition is DENIED.

A certificate of appealability will not issue. Reasonable jurists would not "find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Pena may seek a certificate of appealability from the Ninth Circuit.

The Clerk shall judgment in favor of respondent and close the file.

IT IS SO ORDERED.

Dated: June 1, 2015

WILLIAM H. ORRICK
United States District Judge